IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 58 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJENDRAKUMAR RATANSINH VAGHELA - Applicant(s)

Versus

THE STATE OF GUJRAT & 1 - Respondent(s)

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Appearance :

MR YOGESH S LAKHANI for Applicant(s) : 1,
MR HM PRACHCHHAK APP for Respondent(s) : 1,
MR MM TIRMIZI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 12/09/2005

ORAL JUDGMENT

1. By filing instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure ('the Code' for short), the petitioner seeks to challenge the

order dated 13.1.2005 recorded below application Ex.17 in Sessions Case No.127 of 2004 by the learned Additional Sessions Judge, Fast Track Court No.9, Vadodara by which the application filed under Section 319 of the Code by respondent No.2 herein/ original accused to implead the petitioner as co-accused in Sessions Case No.127 of 2004 has been granted and thereby the petitioner was ordered to be impleaded as one of the accused in Sessions Case No.127 of 2004.

2. The petitioner is the original complainant who has filed a complaint on 11.2.2004 against the accused, inter alia, stating that the petitioner was running a security agency in the name of New India Security Service. It was stated that the petitioner had taken on rent a premises from Navransing Lekhsing. It was also stated that since last about ten days before lodging of the complaint, a security guard Gangaprasad Pande and one another person were staying in the flat in question. It was alleged in the complaint that on the date of the complaint, in the morning hours, the petitioner's partner came to his house and informed that one of the security guards who was staying in the said office when was cleaning the flat and opened the maliya situated in the bed room, certain weapons were found and therefore the petitioner

immediately informed his father-in-law who incidentally happens to be a Police Inspector and they also informed the Deputy Commissioner of Police who was also present. The said Deputy Commissioner of Police thereafter asked the concerned Police Officer who recorded the complaint to make search of the said place and certain weapons and cartridges were found in the said maliya. Therefore, FIR came to be registered against respondent No.2 vide CR No.II-6/2004 at DCB Police station for commission of the alleged offences under sections 25 (i)(i-a), (i-a-a-) (1-b), (a)(c) of the Arms Act ('the Act' for short). Thereafter the investigation was put into motion and during the course of investigation evidence was divulged against respondent No.2 and therefore he came to be charge-sheeted for commission of the alleged offences as aforesaid. The said case was registered as Criminal Case No.2041 of 2004 which to be committed to the Sessions Division of Vadodara where it was numbered as Sessions Case No. 127 of 2004. Charge was framed against respondent No.2 for commission of the alleged offences. Respondent No.2 pleaded not guilty to the charge and, therefore, he was put on trial.

3. Thereafter evidence was recorded and in the midst of the trial, after recording of the evidence of the

petitioner, respondent No.2 gave an application under Section 319 of the Code vide Ex.17 to implead the petitioner as co-accused in the said Sessions case. The learned Additional Sessions Judge vide order dated 13.1.2005 granted the said application and thereby impleaded the petitioner as co-accused which has given rise to the present petition.

4. At the time of admission hearing, while issuing Rule vide order dated 10.2.2005, this Court (Coram: C.K. Buch, J.) has granted interim relief in terms of para 4(C) of the prayer clause, however, with a clarification that the trial court should proceed with the hearing of the case qua the original accused persons.

5. Mr. Y.S. Lakhani, learned advocate for the petitioner, has contended that it is true that the petitioner has taken on rent the premises in question from respondent No.2. The learned trial Judge has not properly appreciated the facts and allegations made in the complaint. It is contended that the description of the arms given by the petitioner was on his experience as he was serving in army at one point of time. The theory propounded by the original accused of planting such weapons just cannot be believed for various reasons. One

of the reasons is that the weapons in question are so costly and not easily available that the petitioner cannot be expected to plant such weapons with view to avoid the payment of rent which is hardly Rs.5,000/- per month. He has further contended that after the complaint the other premises of the very accused Navransinh was inspected and searched by police and from there also weapons were found. Respondent No.2/original accused is a history sheeter against whom several similar offences have been registered and he had also faced trial for the offences. There is no enmity between the petitioner and respondent No. 2 and therefore there was no reason for the petitioner to wrongly involve respondent No.2 in the said crime. If at all the petitioner was the owner of the arms he would not have informed the police and therefore according to him the order impleading the petitioner as co-accused is absolutely illegal and unjust on the facts and circumstances of the case.

6. Besides this, it is also asserted by him that by virtue of the interim order, this Court had directed the trial court to proceed with the trial qua other accused persons and as per the said order the trial is concluded and respondent No.2 has been acquitted of the offence with which he was charged and therefore no useful purpose

would be served by conducting the trial against the petitioner. Therefore he contended that the petition deserves to be allowed by quashing and setting aside the order dated 13.1.2005 passed below application Ex.17 by the learned Additional Sessions Judge, Vadodara in Sessions Case No.127 of 2004. He, therefore, urged to allow this petition.

7. Mr. HM Prachchhak, learned APP has supported the order passed by the learned Additional Sessions Judge and contended that this being a Criminal Revision Application filed under Section 397 read with Section 401 of the Code wherein the jurisdictional sweep is limited, this Court may not interfere with the impugned order passed by the learned trial Judge and urged to dismiss the petition.

8. Per contra, Mr. MM Tirmizi, learned advocate for respondent No.2 has contended that witness Rajendrakumar Vaghela who was examined at Ex.13 had admitted that the flat was hired four months before the commission of the offence. He also admitted that since the date of hiring the office as well as the flat, the same are in his possession. He has also admitted that Gangaprasad Pande informed him that one gun was found on the loft. He never informed that apart from a gun there were AK 56 or .315

sniffer riffles. Gangaprasad Hiralal Pande, Ex.31 has inter alia stated that the room was locked and the keys remained with Rajendrasinh. According to him, at the time of commission of offence, the flat was in possession of the petitioner and therefore he is the main culprit and therefore the learned trial Judge has rightly impleaded him as co-accused in the said Sessions Case.

9. Besides this point, Mr. Tirmizi has further contended that this is a Criminal Revision Application filed under section 397 read with section 401 of the Code. Therefore, even if two views are possible, this Court may not substitute its own view in place of the view taken by the trial court. He has further contended that by putting the petitioner on trial, no prejudice is going to be caused to him. He has also contended that the petition lacks merit and deserves to be rejected. He therefore urged to reject the petition.

10. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned order and the judgments cited at the bar.

11. As per the prosecution case, the petitioner is the

original complainant who has filed a complaint on 11.2.2004 against the accused, inter alia, stating that the petitioner was running a security agency in the name of New India Security Service. It was stated that the petitioner had taken on rent a premises from Navransing Lekhsinh. It was also stated that since last about ten days before lodging of the complaint, the security guard Gangaprasad Pande and one another person were staying in the flat in question. It was alleged in the complaint that on the date of complaint, in the morning hours, the petitioner's partner came to his house and informed that one of the security guards who was staying in the said office when was cleaning the flat and opened the maliya situated in the bed room, certain weapons were found and therefore the petitioner immediately informed his father-in-law who incidentally happens to be a Police Inspector and they also informed the Deputy Commissioner of Police who was also present. The said Deputy Commissioner of Police thereafter asked he concerned Police Officer who recorded the complaint to make search of the said place and certain weapons and cartridges were found in the said maliy. Therefore, FIR came to be registered against respondent No.2 vide CR No.II-6/2004 at DCB Police station for commission of the alleged offences under sections 25 (i)(i-a), (i-a-a-) (1-b), (a)(c) of the Act.

Thereafter the investigation was put into motion and during the course of investigation evidence was divulged against respondent No.2 and therefore he came to be charge-sheeted for commission of the alleged offences as aforesaid. The said case was registered as Criminal cases No.2041 of 2004 which to be committed to the Sessions Division of Vadodara where it was numbed as Sessions Case No. 127 of 2004. Charge was framed against respondent No.2 for commission of the alleged offences. Respondent No.2 pleaded not guilty to the charge and, therefore, he was put on trial. Thereafter evidence was recorded and in the midst of the trial, after recording of the evidence of the petitioner, respondent No.2 gave an application vide Ex.17 to implead the petitioner as co-accused in the said sessions case. The learned Additional Sessions Judge vide order dated 13.1.2005 has granted the application and thereby impleaded the petitioner as co-accused which has given rise to the present petition.

12. In the facts and circumstances of the case, according to this court, the following tell-tale circumstances which are material and which would not justify the order passed by the learned trial Judge to implead the petitioner as co-accused in the Sessions case No.127 of 2004 are as under:

(i) The petitioner being original complainant who has taken on rent the premises in question from respondent No.2 would never be expected to plant the weapons worth lakhs of rupees only for the reason that the petitioner has not to pay the rent of the flat for a period of 4 to 6 months which comes hardly to Rs.25,000 to Rs.30,000/-

(ii) There is nothing on record to show that there was any prior enmity between the petitioner and respondent No.2.

(iii)Panchnama of the seizure of the of weapons in question indicates the value of one of the weapons being AK 56 rifle worth Rs.2 lakhs and one 315 bore Riffle worth Rs.1 lakh and there are about other 6 to 7 items seized the value of which collectively is about Rs.75000/- The petitioner would never plant such costly arms and ammunition for the reason that he has not to pay the rent to the tune of Rs.25,000 to Rs.30,000.

(iv) The learned trial Judge has committed a serious error in assuming the deposition of the petitioner himself and the deposition of witness Gangaprasad Pande to be sufficient to exercise the powers under section 319 of the Code to implead the petitioner as co-accused in that trial. If depositions of the petitioner himself

(Ex.13) and the witness Gangaprasad Pande (Ex.31) are seen, the same in no way be considered as bringing an evidence on record against the petitioner himself.

(v) During the course of entire trial where number of witnesses are examined, not a single piece of evidence has come on record whereby it can be said that the petitioner has committed an offence and he can be jointly tried with the accused already arrested and facing the trial.

(vi) At the best, the cross examination made on behalf of the accused and the reply given by the petitioner and the witness Gangaprasad might lead to a situation whereby the defence may have the benefit of doubt. Leading to a situation on the basis of the evidence recorded before the trial court whereby the defence could successfully plead its case to claim the benefit of doubt which can never be construed as the evidence against the petitioner.

(vii) The seizure of the costly weapons from the premises of the accused is not restricted to the weapons so seized but it appears that even after the arrest of the accused/ respondent No.2 further arms and ammunitions

were discovered at his instance from other place also.

(viii) Respondents No.2 is a person who was not only facing the present case under the Act but was facing various criminal cases as under:

(a) Case registered as CR No.I-139 of 1985 with Makarpura Police station for the offences punishable under sections 143, 147, 148 and 307 of IPC and under the provisions of the Act. In the said case prohibited arms were seized and respondent No.2 was convicted.

(b) Case registered vide CR No.I-140 of 1985 with Makarpura Police station for the offences punishable under sections 143, 147, 148 and 307 of IPC and under the Act and in the said case also respondent No.2 has been convicted.

(c) Case registered vide CR No.I-153 of 1980 with Chhani Police station for the offences punishable under sections 147, 148, 363, 364 and 302 of IPC and under various Sections of the Act. In the said case, respondent No.2 was granted benefit of doubt and was acquitted.

(d) Case registered vide CR No. I-46 of 1991 with DCB

Police Station under the provisions of TADA Act and also under section 120B of the IPC for operating terrorist activities and to provide arms and ammunition to other accused.

(e) Case registered vide CR No.II-41 of 2004 with Sayajiganj Police station under the Act and arms were seized and recovered from respondent No.2.

Therefore in all five cases have been registered against respondent No.2 out of which in some cases he has been convicted. Therefore, past of respondent No.2 is very shabby and he is a history sheeter of the crimes.

(ix) Father-in-law of the petitioner was serving as Police Inspector at JP Road police station and he was also requested to be arraigned as an accused under section 319 of the Code vide application Ex. 21 but subsequently the said application was withdrawn by respondent No.2. Respondent No.2 in defence when has tried to suggest that the arms found from Nihar Apartment were planted by the petitioner taking help of his father-in-law who is a Police inspector, the withdrawal of the application against the father-in-law of the petitioner would itself suggest that there is no force in the said

defence put forward by respondent No. 2 and in absence of any such evidence showing the complicity either of the petitioner or any other person as alleged, the powers under section 319 of the Code could not have been exercised by the learned trial Judge against the petitioner and therefore the impugned order deserves to be quashed.

(x) If the impugned order is allowed to stand, de-novo trial has to be initiated and all the witnesses have to be called again and re-examined in the present case which would create an anomalous situation. In instant case, the trial against respondents No.2 is concluded and he has been acquitted of the offence with which he was charged.

13. It is settled principle of law that powers under section 319 of the Code is to be exercised sparingly and only in cases where the evidence is brought on record to point out that somebody else is also involved in the offence other than the accused already being tried.

14. In the case of Michael Machado and another v. Central Bureau of Investigation and another, AIR 2000 SC 1127 the supreme court has held that invoking the powers

under section 319 of the Code at a belated stage after cross-examination of many witnesses and at the cost of de-novo trial is not proper.

15. In aforesaid view of the matter, the impugned order is not justified and it does not stand to scrutiny of this Court and deserves to be quashed and set aside by allowing this revision application.

16. For the foregoing reasons, the petition succeeds and accordingly it is allowed. Order dated 13.1.2005 passed by the learned trial Judge below application Ex.17 in Sessions Case No.127 of 2004 is quashed and set aside the result of which is that the application Ex.17 filed by respondent No.2 for impleading the petitioner as co-accused is hereby rejected.

Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

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